

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 06-93

September 15, 2006

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Issuance of Informal Copy of the National Labor Relations Board
Casehandling Manual (Part Three) Compliance Proceedings

We are pleased to announce that an informal copy of the National Labor Relations Board Casehandling Manual (Part Three) Compliance Proceedings has been drafted and will be posted on the intranet for review before a final version of the manual is issued. Hard copies of the Informal copy of the Revised Compliance Manual will be made available upon request. We hope to issue the final copy of the manual in about 90 days, including an electronic copy on the Agency's intranet.

The last revision of the compliance manual was completed in 1993. The manual has been completely reorganized to make it more "reader friendly" and so that it follows the path of normal case processing. The sections dealing with formal compliance proceedings, bankruptcy and contempt proceedings have been expanded so as to provide greater information and guidance.

Attached for reference are the highlights of the changes contained in the revised manual. Generally, we have made revisions to capture changes that have previously been announced in OM and GC memoranda. However, there are a few revisions that reflect changes in practices or procedures not previously announced. Those sections include:

- **10562.4 Determining Backpay for Missing Discriminatees.** For missing discriminatees, if the Region is unable to calculate backpay through a comparison with other discriminatees or if the number of discriminatees is too small to support the use of statistical sampling, interim earnings may be estimated as thirty-five percent of gross backpay.
- **10578.7 Lump-Sum Payments and Payments for Missing Discriminatees.** This section was revised to reflect that where a lump sum payment constitutes less than 100% of the backpay and interest owed, unless the settlement specifically provides that the sum paid includes the employer's

share of FICA, such amounts remain the responsibility of the employer and should not be withheld from the distributions made to discriminatees.

- **10592.8 Reinstatement.** Requirement added that after the issuance of a court judgment, the Contempt Litigation & Compliance Branch must approve a settlement that does not require reinstatement where the Regional Director determines a discriminatee is unsuitable for employment.
- **10616.4 New Charge Filed Against a Respondent Subject to an Outstanding Court Judgment; Withdrawal of Charges Against Respondent Subject to an Outstanding Court Judgment.** This section now provides that Regions should consult with Contempt Litigation & Compliance Branch before approving any withdrawal requests where a charge appears to be arguably meritorious and there is an outstanding court judgment.
- **10676 Prejudgment Writs of Garnishment, Attachment, Receivership, and Sequestration.** The section now provides that Regions should consult with the Contempt Litigation & Compliance Branch before initiating any pre-judgment Federal Debt Collection Proceedings Act proceedings actions.
- **10678.3 Conduct of Collection Proceedings.** Section revised to add the requirement that Regions should consult with the Contempt Litigation & Compliance Branch before initiating Federal Debt Collection Proceedings Act post-judgment proceedings involving execution orders, installment payment orders, actions in which a new party is being added for the purpose of establishing the derivative liability of such a party or where the Agency will be seeking interim *pendete lite* relief.
- **10678.6 Execution.** Regions advised to consult with the Contempt Litigation & Compliance Branch prior to initiating any Federal Debt Collection Proceedings Act action seeking an execution order.
- **10678.7 Installment Payment Orders.** Requirement added that Regions should consult with the Contempt Litigation & Compliance Branch prior to initiating any Federal Debt Collection Proceedings Act action seeking an installment payment order.
- **10698 Regional Performance and Excusable Overage Situations.** Requirement added that Regions should review the status of each bankruptcy case at least every 30 days utilizing PACER.

Copies of sample letters and documents to serve as models for Regional Offices also were included in the revised manual.

Special thanks to Deputy Assistant to the General Counsel Beth Tursell who has coordinated this substantial project and to the many field and headquarters employees who assisted her in this effort. We encourage you to review the manual. Any comments or suggestions you may wish to share about the manual should be e-mailed to DAGC Beth Tursell by close of business on November 30, 2006.

/s/
R.A.S.

Attachment

cc: NLRBU
Release to the Public

MEMORANDUM OM 06-93

National Labor Relations Board
Casehandling Manual (Part 3)
Compliance Proceedings Revision Highlights

Forward This is a new section encouraging Regions to start collecting compliance information while conducting the unfair labor practice investigation.

10504 Pre-Complaint Compliance Procedures. This is a new section designed to introduce compliance concepts to all Board Agents. It provides investigative tips and includes a handy checklist of compliance-related information that should be sought during the investigation of the charge. It also advises Board agents to be alert to recidivist respondents, to third parties and to bankruptcy filings, against whom derivative liability can be pursued.

10506.2 Upon the Region's Determination of a Violation. Expanded to include a list of various actions to consider when decision is made to issue complaint.

10506.3 Maintaining Contact with Discriminatees and Identifying Unnamed Discriminatees. Adds new requirement that efforts be made to identify, locate, and contact discriminatees who were not specifically identified in the complaint.

10544.3 Retirement Benefits. New section included on tax deferred retirement plans such as 401(k) plans.

10560.7 Undocumented Workers. This section has been updated pursuant to the Supreme Court's ruling in Hoffman Plastic Compounds, Inc. v. NLRB, 122 S. Ct. 1275 (2002) regarding reinstatement and backpay issues for undocumented workers.

10548 Use of Alternative Methods in Backpay Determinations. New section encouraging the use of alternative methods to make efficient use of agency resources and to expedite distribution of backpay. Methods discussed in this section include:

- Statistical sampling (10548.1)
- Approximations and averages (10548.2)
- Allocation of lump sum backpay amounts (10548.3)

10576.1 Recording Receipt of Backpay. New section setting forth Region's responsibility for recording receipt and disbursement of backpay checks under *The Accountability of Tax Dollars Act of 2002*.

10576.2 Standard Procedures for Disbursement of Backpay and Interest Payment. This section adds requirement to remind discriminatee of his/her obligation to repay any State or Federal Agency for amounts collected during backpay period, the obligation to pay federal and/or state taxes and/or the need to contact Social Security Administration to obtain the proper quarterly credit of backpay.

19576.8 Lump-Sum Payments, When Net Backpay Due Individual Discriminatees is Not Determined. This section adds suggestion that Regions attempt to negotiate agreement under which the final distribution is at the sole discretion of the Regional Director, thereby avoiding any later disputes regarding distribution amounts.

10576.10 IRS Levies; Notice of Levy Served on Regional Office. New section with detailed procedures regarding IRS levies on backpay awards.

10580.2 Opening an Escrow Account Through the Agency's Finance Branch. Instructions to Respondent. This section adds sentence dealing with the Finance Branch's preference to have the money wired directly. OM 98-57.

10580.3 Transmitting Checks to Finance Branch. This section adds requirement for additional information in transmittal memorandum from the Region.

10580.4 Interest-Bearing Accounts Through Finance Branch. Provides update information regarding the deposit of backpay money into interest bearing accounts pursuant to OM 98-57.

10582.1 Procedures for Requesting Disbursement. Adds requirement that Regions send electronic spreadsheet to the Finance Branch containing the information needed for disbursement.

10582.2 Finance Branch Procedures for Disbursement. Updates procedures for mailing backpay checks to the Regions pursuant to OM 01-43.

10588 Procedures for Closing Escrow Accounts. Adds requirement that Regions contact Contempt Litigation & Compliance Branch before closing an escrow account that was established with money received from a bankrupt respondent.

10592.5 Settlement Based on Preliminary Estimates of Backpay. Incorporates suggestions initially announced in OM 98-11 at No. 3 regarding alternate methods of calculating backpay, such as statistical sampling, exclusion of de minimis claims, and variations regarding lump sums.

10594.1 Language and Format. Notes the revision of *Settlement Agreement*, Standard Form 4775 announced in OM 02-44 including the numerous samples and attachments that are also available as an appendix to this Manual.

10594.2 Plain Language Notices. Observes the Board's endorsement of plain language in Notices so that employees may better understand the remedy, referring agents to OM 02-43 for general guidance and to OM 03-40 for sample language in English.

10594.3 Foreign Language Notices. Notes the importance of arranging for Notices in languages other than English in advance of approval of the settlement, and refers agents to OM 99-18 for a list of foreign language Notices and remedial provisions that are available, and to OM 03-86 for plain language Notice provisions in Spanish.

10594.5 Mailing of Notices. The Board now routinely requires a respondent that has ceased doing business or closed its facility, to mail Notices to employees. This section sets forth factors to consider in determining the need for and procedure to accomplish a mailing instead of or along with a posting.

10594.7 Reservation Language. Discusses the need to tailor, or the option to forgo, as warranted, the broad reservation clause that is included in the boilerplate of Settlement Agreement, Standard Form 4775.

10598.8 Default Language. Sets forth the circumstances in which Regions should include default language in settlement agreements and provides sample language for both pre- and post-complaint circumstances. See **10598.12, Non-compliance with an Informal Settlement Agreement**, for additional discussion of default language.

10594.10 Special Language for Informal Settlements in Cases with Outstanding Section 10(j) or 10(l) Injunctions. Pursuant to OM 01-62, provides language to be included in informal settlements to ensure that the pre-existing injunction continues in effect until compliance has been achieved, rather than arguably expiring upon approval of the settlement.

10606.1 Liquidating Backpay Before Recommending Enforcement. New section added discussing circumstances when it may be appropriate to liquidate backpay before recommending enforcement.

10608.1 Submission (Enforcement). Deletes requirement that Regional Attorney has to concur in Region's recommendation for enforcement.

10618.1 Issuance of Section 11 subpoena. Updates section pursuant to GC 00-02 regarding when Regions must seek approval to issue Section 11 subpoenas.

10632 Contempt and Other Post Judgment Proceedings. This section has been revised in order to provide the reader with an overview of the contempt process and when contempt, rather than collection proceedings, should be utilized to effectuate compliance with Court judgments (10632.1; 10632.5(d)).

10632.4 Compliance Developments after Submission of Contempt Recommendation. New section added to emphasize the importance of notifying the Contempt Litigation & Compliance Branch regarding compliance developments after submission of its contempt recommendation.

10634.1 Circumstances in Which Formal Settlement Stipulations May Be Appropriate or Necessary. This is a new section that provides guidelines as to when a formal settlement stipulation should be considered.

10634.2 Submission of Formal Stipulations by E-Mail. This is a new section requiring that formal settlement stipulations be sent by e-mail to the Office of the Executive Secretary.

10636 Installment Agreements and Security Provisions. This section has been updated to reflect the new procedures for submission of bilateral and unilateral formal settlement stipulation and security arrangements.

10638 Compliance Stipulations. Adds a new section on securing a writing detailing how a respondent is to comply with a Board Order or Court Decree.

10642 Consent Order. New section that notes under what circumstances an ALJ can approve a "Settlement" where both the charging party and the General Counsel oppose it.

10650.5 Interim Earnings Documents. Additional guidance is provided to the regional offices regarding the disclosure of factual information relevant to the computation of net backpay, following issuance of the compliance specification. A sample list of documents gathered during compliance backpay investigations is included to assist the regions in determining documents that are discloseable without redaction, documents that are discloseable with redaction and documents that should not be disclosed to respondent.

10660.6 Expert Witness. New section added regarding expert witness testimony.

10660.7 Settlement Judge. New section regarding the role of settlement judges following issuance of a compliance specification.

10660.8 Pre-hearing Conferences. New section regarding pre-hearing conferences with the administrative law judge.

10668 Compliance Briefs. New section regarding briefs to the administrative law judge following the compliance hearing

10662.3 Litigation of Compliance Issues. New section recognizes that there may be occasions where the General Counsel will want to question a witness on a matter concerning which the respondent bears the burden (i.e., search for work).

10662.9 Presentation of Documents. This section is modified to clarify that only upon a request should the General Counsel provide documentation of interim earnings.

10666.2 The Respondent's Case Regarding Interim Earnings. This section is modified to highlight discriminatee's obligation to fully report interim earnings.

10666.3 The Respondent's Examination of Discriminatees Regarding Mitigation. Adds section highlighting potential areas of inquiry that may be pursued by a respondent regarding a discriminatee's search for work.

10670 Bankruptcy

The bankruptcy section of the Manual has been substantially revised in order to provide the reader with an overview of current bankruptcy law as well as an understanding of the bankruptcy process from the filing of a bankruptcy petition through the Agency's receipt of payment on its bankruptcy claim.

10670.2 Assistance with Bankruptcy Issues. New section added to emphasize:

- the importance of contacting either the Contempt Litigation and Compliance Branch or the Special Litigation Branch for assistance with bankruptcy issues;
- the requirement that before participating in person in any bankruptcy court proceeding or before filing a pleading in any contested or adversary proceeding in bankruptcy court, the Region promptly consult the Contempt Litigation and Compliance Branch or the Special Litigation Branch, as appropriate; and
- the need for a Region to ensure that its legal staff is registered to file documents electronically with the bankruptcy courts located in the Region's geographic jurisdiction.

10670.4(a) General Principles. Emphasis added that Social Security numbers for backpay claimants generally should not be included in a proof of claim or other bankruptcy pleadings.

10670.4(b) Duplicate Claims. This section cautions against filing duplicative proofs of claims in bankruptcy if the union or the particular fund has or will timely file a proof of claim covering the same indebtedness.

10672 – 10686 Protection of Agency's Interest, Collection of Monetary Judgments and Derivative Liability. This section of the Manual has been substantially revised and restructured in order to:

- emphasize the use of AutoTrack, the Agency's electronic investigative service, to identify and evaluate Respondent's assets in order to achieve full compliance with the Board's orders (10672.1);
- set forth when it is appropriate to seek a protective restraining order (10674.2-.8);
- explain prejudgment attachment, garnishment, and execution (10676);
- provide an overview of collection approaches before and after backpay is liquidated in a court-enforced supplemental Board order (10678.1-.3);

- explain post judgment garnishment, execution, and installment payment orders (10678-10678.7); and
- aid in the investigation and proof of derivative liability cases (10682), including a useful check list (10686).